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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ANTHONY RUIZ, Defendant and Appellant.	B208803 (Los Angeles County Super. Ct. No. BA316288)

APPEAL from a judgment of the Superior Court of Los Angeles County, Luis A. Lavin, Judge. Affirmed in part, reversed in part, and remanded with directions.

Nancy Jane Mazza for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Joseph Anthony Ruiz appeals from the judgment entered following his convictions by jury of attempted voluntary manslaughter (Pen. Code, §§ 192, 664; as a lesser offense of count 1 - attempted murder (Pen. Code, §§ 664, 187), count 2 - first degree burglary (Pen. Code, § 459) with firearm use (Pen. Code, § 12022.5, subd. (a)), and count 3 - attempted first degree robbery (Pen. Code, §§ 664, 211) with personal use of a firearm (Pen. Code, § 12022.53, subd. (b)), personal and intentional discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), and personal and intentional discharge of a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d)). The court sentenced appellant to prison for 27 years to life. We affirm the judgment, except that we reverse appellant's conviction for attempted first degree robbery (count 3), and remand the matter.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that about November 20, 2006, appellant committed sex acts with Israel Santos, a transsexual prostitute, at the latter's Los Angeles apartment. Appellant paid Santos $400 for the acts, and subsequently left. About an hour later, appellant returned and, intending to kill Santos and rob him of the $400, shot him.

CONTENTIONS

Appellant claims (1) the prosecutor committed misconduct by amending the information to add count 3, (2) respondent should be estopped from arguing appellant waived the prosecutorial misconduct issue by appellant's failure to object below on that ground, and (3) appellant was wrongfully convicted of attempted first degree robbery because no evidence of that offense was presented at the preliminary hearing.[1]

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[1] Respondent claims in a footnote that the trial court correctly imposed, but erroneously stayed, two Penal Code section 1465.8, subdivision (a)(1) court security fees pertaining to appellant's convictions for attempted voluntary manslaughter and first degree burglary, respectively.

DISCUSSION

Appellant Was Wrongfully Convicted of Attempted First Degree Robbery (Count 3).

Appellant claims he was wrongfully convicted of attempted first degree robbery because evidence of that offense was not presented at the preliminary hearing. For the reasons discussed below, we agree.

1. *Pertinent Facts.*

a. *Preliminary Hearing Proceedings.*

At all times herein mentioned, appellant was represented by counsel. At appellant's February 22, 2007 preliminary hearing, the magistrate indicated the felony complaint alleged attempted murder, and first degree burglary. Only the victim, Santos, testified, and he testified in pertinent part as follows. Santos was a transsexual prostitute who was originally a male and still had a penis.

Late on November 19, 2006, or early on November 20, 2006, appellant called Santos's residence and Santos invited appellant to come over. Appellant arrived, paid Santos $400, the two engaged in sex acts, and appellant later left about 2:00 a.m. Santos was nude during the sex acts and appellant knew Santos had a penis.

About 2:30 a.m., appellant called and asked if he could return. According to Santos, appellant, about 20 to 30 minutes after appellant had left, returned with a bottle of liquor because appellant wanted to drink. Santos let appellant inside the residence, appellant gave Santos the bottle, and Santos turned around. Appellant then pulled out a gun. Santos testified the gun was "black . . . with a cartridge." When Santos so testified, he gestured, and the prosecutor suggested the gesture was "racking a magazine."

After appellant pulled out the gun, Santos turned and saw appellant holding it. The reporter's transcript reflects the following colloquy during the People's direct examination of Santos: "Q Did [appellant] say anything while he had the gun? [¶] A What I remember was that he wanted to kill me. [¶] Q And did he say this in Spanish or English? [¶] A (In English) Sorry. I want to kill you."

Santos backed up, talking to appellant to calm him. Santos then tried to get away and went towards a second floor balcony. Santos, facing appellant and walking

backwards, saw appellant point the gun at him. Appellant was holding the gun in his right hand and using his left hand to hold his right wrist. Appellant shot Santos, hitting his right shoulder. Santos jumped off the balcony, breaking his leg when he hit the ground.

The only offenses for which the magistrate held appellant to answer were attempted murder, and burglary. The magistrate did not hold appellant to answer for attempted robbery, and no one mentioned that offense at the preliminary hearing.

b. *Trial Court Proceedings.*

(1) *The Original Information and Related Proceedings.*

The March 2007 information alleged, in pertinent part, attempted willful, deliberate, and premeditated murder (count 1) and first degree burglary with a person present (count 2). Counts 1 and 2 were the only alleged offenses; the information did not allege attempted robbery.

On November 9, 2007, Nancy Jane Mazza, retained counsel, substituted in as trial counsel for appellant. (Mazza is also appellant's retained appellate counsel.) Mazza told the trial court she thought there would be a disposition in the case.

(2) *The Amended and Second Amended Informations and Related Proceedings.*

After several continuances, the trial court, on February 7, 2008, called the case for jury trial and the following occurred: "The Court: Looking at the file, my understanding is you've exhausted whatever offers in this case; is that correct? [¶] [The Prosecutor]: Yes, that appears to be so. [¶] The Court: Okay. [¶] [The Prosecutor]: Your Honor, as to the information, with the court's permission, although, this is a late hour, I realize, I have an amended information. It does conform to the testimony of the victim in the preliminary hearing. It would be the addition of one additional count, which would be attempted robbery in the first degree with same allegation [*sic*] attached."

The court asked if Mazza wished to be heard regarding the prosecutor's request to amend the information to add count 3. Mazza replied, "Your Honor, no except for the late hour, but [the prosecutor] is right. It does conform to the prelim [*sic*] transcript."

The court accepted the amended information which, as filed, and in pertinent part, added count 3 which alleged attempted first degree residential robbery. The court arraigned appellant on the amended information and he pled not guilty.

Later that day, the court indicated it had read the preliminary hearing transcript, and the court said, "[a]s I understand the People's case, People allege that Mr. Ruiz attempted to kill a transgender prostitute." The prosecutor did not then dispute the trial court's characterization of the People's case. Voir dire of prospective jurors commenced on February 7, 2008, and a jury was sworn the next day.

After the presentation of evidence at trial, a second amended information was filed on February 21, 2008. The second amended information made a change not pertinent to this appeal, and the second amended information still alleged attempted first degree robbery (count 3). Appellant did not object to the second amended information. He was arraigned thereon and pled not guilty. Appellant never raised the issue of whether he was being wrongly prosecuted for attempted robbery on the ground no evidence of attempted robbery had been presented at the preliminary hearing.

(3) *Conviction and Sentencing.*

The jury, inter alia, acquitted appellant of attempted murder (count 1), but convicted him of attempted voluntary manslaughter, first degree burglary, and attempted first degree robbery as previously indicated. The court sentenced appellant to prison for 27 years to life, consisting of the two-year middle term for attempted first degree robbery (count 3), plus 25 years to life pursuant to Penal Code section 12022.53, subdivision (d), with a concurrent term of eight years for first degree burglary (count 2) (the four-year middle term for the burglary, plus four years pursuant to Penal Code section 12022.5, subdivision (a)), and a concurrent term of six years for attempted voluntary manslaughter. The court also indicated that, pursuant to Penal Code section 654, the court stayed the sentences on attempted voluntary manslaughter and count 2. We will present additional facts below.

2. *Analysis.*

a. *Pertinent Law.*

As the court in *People v. Burnett* (1999) 71 Cal.App.4th 151 (hereafter, *Burnett*), observed, "Article I, section 14, of the California Constitution provides in pertinent part: 'Felonies shall be *prosecuted* as provided by law, either by indictment or, *after examination and commitment by a magistrate*, by information.' Our *Constitution* thus requires that 'one may not be *prosecuted in the absence of a prior determination of a magistrate* or grand jury that such action is justified.' (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 666 [94 Cal.Rptr. 289, 483 P.2d 1241].) 'Before any accused person can be called upon to *defend* himself on any charge prosecuted by information, *he is entitled to a preliminary examination upon said charge,* and the judgment of the *magistrate* before whom such examination is held as to whether *the crime for which it is sought to prosecute him* has been committed, and whether there is sufficient cause to believe him guilty thereof. These proceedings are essential to confer *jurisdiction* upon the court before whom he is placed on trial.' (*People v. Bomar* (1925) 73 Cal.App. 372, 378 [238 P. 758].)

"[Penal Code section] 739 provides in pertinent part: 'When a defendant has been examined and committed . . . , it shall be the duty of the district attorney . . . to file in the superior court . . . , an *information* against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment *or* any offense or offenses *shown by the evidence taken before the magistrate to have been committed*.' ' "[A]n information which charges the commission of an offense not named in the commitment order will not be upheld unless (1) *the evidence before the magistrate shows that such offense was committed* [citation], and (2) that the offense 'arose out of the transaction which was the basis for the commitment' on a related offense. [Citations.]" ' (*People v. Pitts* (1990) 223 Cal.App.3d 606, 903 . . . quoting *Jones v. Superior Court, supra,* 4 Cal.3d 660, 664-665.)

"An indictment or information may be *amended* by the district attorney at any time before the defendant pleads, and the court may allow amendment of the accusatory

pleading 'for any defect or insufficiency, at any stage of the proceedings.' ([Pen. Code,] § 1009.)[2] Section 1009 provides, however, that '[a]n indictment or accusation *cannot* be amended so as to change the offense charged, *nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination*.' " (*Burnett, supra,* 71 Cal.App.4th at p. 165, italics added.) *Burnett* discusses several exemplary cases. (*Id*. at pp. 165-166.) A conviction for an offense not shown by the evidence taken at the preliminary hearing is reversible per se, without analysis of prejudice. (*Id.* at p. 177.)

Finally, if an information is amended to allege an offense not shown by the evidence taken at the preliminary hearing, and the defendant fails to object to or otherwise challenge on that ground the prosecution of the offense, the issue of whether the defendant was improperly convicted of that offense because it was not shown by evidence taken at the preliminary hearing is waived on appeal. (Cf. *Burnett*, *supra*, 71 Cal.App.4th at pp. 178-179.) However, where a defendant is represented by counsel, counsel's failure to raise the issue may constitute ineffective assistance of counsel. (*Id.* at pp. 155, 179-183.)

b. *Application of the Law to the Facts of This Case.*

As mentioned, Mazza, appellant's retained appellate counsel, was also appellant's retained trial counsel. We invited the parties to submit supplemental briefs on, inter alia,

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2 Penal Code section 1009 states, in relevant part, "The court in which an action is pending may order or permit an amendment of an . . . information, . . . for any defect or insufficiency, at any stage of the proceedings, or if the defect in an . . . information be one that cannot be remedied by amendment, may order the case submitted to the same or another grand jury, or a new information to be filed. The defendant shall be required to plead to such amendment or amended pleading forthwith, or, at the time fixed for pleading, if the defendant has not yet pleaded and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

the issue of whether, if Mazza were to argue here that appellant was denied effective assistance of trial counsel because trial counsel failed to object to the information, Mazza would be providing ineffective assistance as appellate counsel because Mazza would have to argue here her own incompetence as trial counsel, thereby presenting a conflict of interest. The parties provided supplemental briefs and we have considered them.

However, the parties agree in their supplemental briefs that, notwithstanding the fact that Mazza did not object to the prosecution of appellant on count 3, we may reach the merits of the issue of whether appellant was wrongfully convicted on that count in order to forestall a claim of ineffective assistance. Theories of legal error aside, the sole issue in this case, as far as appellant is pragmatically concerned, is whether as a matter of remedy appellant's conviction on count 3 should be reversed. Although the ineffective assistance issues are a matter of concern to this court, we reach the wrongful conviction issue on its merits to forestall ineffective assistance claims and conserve judicial resources.

"An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (Pen. Code, § 21a.) Based on the preliminary hearing evidence, after appellant and Santos engaged in sex acts for which appellant paid $400, he left. Santos testified appellant returned with liquor because appellant wanted to drink. Shortly after appellant entered the residence the second time, he pulled out a gun. It is simply unclear whether, at that time, appellant intended to rob. True, appellant may have thought that, when he returned, the $400 would still be in the residence. But he also may have thought that Santos would still be in the residence. On these facts, then, it is not clear whether appellant reentered the residence and pulled the gun in an attempt to rob Santos or, e.g., to commit forced sex acts.

Fairly read, the preliminary hearing transcript reflects that, after appellant's entry into Santos's residence and pulling of the gun, appellant said he was sorry and wanted to *kill* Santos. This statement evidenced intent to kill, not intent to rob, and made for an even less convincing showing of intent to rob. If appellant had entered, pulled a gun, and

said he wanted to rob, those facts would not demonstrate intent to kill. Conversely, where, as here, appellant entered, pulled a gun, and said he wanted to kill, these facts do not demonstrate intent to rob. Although respondent maintains there was preliminary hearing evidence of intent to rob, respondent does not discuss the preliminary hearing evidence that appellant said he was sorry and wanted to kill Santos.

Appellant resisted Santos's effort to calm him, then carefully aimed the gun at Santos and shot him at close range in his shoulder. If appellant had intended to rob Santos of $400, one might have expected appellant to try to find out from Santos where the money was before shooting Santos so close to Santos's head and vital parts that appellant might have killed him. Respondent does not discuss this fact.

There was no preliminary hearing evidence that appellant ever mentioned money, the taking of money or anything else, or robbery, and no preliminary hearing evidence that appellant ever attempted to take anything. Essentially, appellant reentered the residence, told Santos that appellant was sorry and wanted to kill Santos, and shot him. No one suggested at the preliminary hearing that appellant committed attempted robbery. Even after the amendment of the information, the trial court characterized the People's case, without objection by the People, as one presenting evidence that appellant attempted to "kill."

The cases cited by respondent in support of his argument that there was sufficient preliminary hearing evidence of attempted robbery are distinguishable. In each such attempted robbery case, there was far more evidence on the issue of intent to rob than was presented at the preliminary hearing in this case.

We conclude appellant was wrongly convicted for attempted first degree residential robbery because it was an offense not shown by the evidence taken at the preliminary hearing. (*Burnett, supra*, 71 Cal.App.4th at p. 177.)[3]

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[3] In light of our holding, there is no need to reach appellant's related claims that the prosecutor committed misconduct, and that respondent is estopped from arguing appellant waived the prosecutorial misconduct issue. Respondent improperly claims in a footnote (cf. *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 502, fn. 5; California

DISPOSITION

The judgment is affirmed, except that appellant's conviction for attempted first degree robbery (count 3) is reversed, and the matter is remanded for proceedings consistent with this opinion.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.

Rules of Court, rule 8.204(a)(1)(B)) that the trial court erred in its disposition of Penal Code section 1465.8, subdivision (a)(1) court security fees (see fn. 1, *ante*). We are confident that, following remand, the trial court will correct any such error.